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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>AMADOR SANTOS,<br><br>Defendant and Appellant. | B287906<br><br>(Los Angeles County Super. Ct. No. BA454491) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen A. Marcus, Judge. Affirmed in part, reversed in part and remanded.

C. Matthew Missakian, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Amador Santos of 10 counts of child molestation. On appeal, defendant contends that his life sentence under Penal Code section 667.61 ("One Strike Law") for a lewd act on a child under 14 with a multiple victim enhancement violates the ex post facto clause.[1] Defendant also contends the trial court prejudicially failed to instruct the jury that he could not be convicted of both continuous sexual abuse and an individual act of sexual abuse that occurred within the same time period. Respondent concedes the ex post facto violation and agrees defendant must be resentenced, but argues that any instructional error was harmless. We agree with defendant on both the ex post facto violation and the instructional error, which we find prejudicial. We affirm in part, reverse in part and remand.

***FACTUAL AND PROCEDURAL BACKGROUND***

Although there were five victims in this case, the issues presented in this appeal challenge convictions in which only Miguel S. and David V. were victimized.

*Victim Miguel S.*

Miguel was the victim named in three of the counts. He was born in 1994. When Miguel was six or seven years old, defendant put Miguel on his lap and touched his penis. A few months later, defendant showed pornography to Miguel and orally copulated him. Miguel testified that defendant orally copulated him about 55 to 60 times before Miguel turned 14 years old, and over 100 times before he turned 18 years old.

Miguel also testified that defendant attempted to commit sodomy with him, and that he was "probably 14, 13" at the time.

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[1] All subsequent statutory citations are to the Penal Code.

Miguel described a second incident of attempted sodomy that happened when he was "the same age, 14. I can't remember."

*Victim David V.*

David V. was the victim in a single count, count 12 — lewd act on a child under 14 years of age in violation of section 288, subdivision (a). Although the conviction in count 12 is challenged on appeal, defendant asserts no error that implicates the evidence adduced on that charge. Accordingly, we need not describe the underlying conduct other than to say that when David was 12 or 13 years old, defendant showed David pornography and engaged in various acts of sexual abuse approximately six times.

*Convictions*

Defendant was originally charged with 12 counts of child molestation. During the trial, the court dismissed one of the charges on statute of limitations grounds. Defendant was ultimately found guilty of 10 counts and acquitted of one. Only the convictions for counts 7 and 12 are challenged on appeal. But two other counts of which defendant was found guilty are implicated in our analysis of the legal issues — counts 1 and 2 — because of the enhanced punishment under section 667.61, subdivision (b) for crimes involving multiple victims. We briefly list each of these four counts and the corresponding victims:

Count 1 — continuous sexual abuse of Oscar A., a child under 14 years of age (§ 288.5, subd. (a)).

Count 2 — continuous sexual abuse of Miguel S., a child under 14 years of age (§ 288.5, subd. (a)).

Count 7 — attempted sodomy of Miguel S., a child under 16 years of age (§§ 664/286, subd. (b)(2)).

Count 12 — lewd act on David V., a child under 14 years of age (§ 288, subd. (a)).

As relevant to our resolution of defendant's ex post facto argument, the information alleged in counts 1, 2 and 12 that defendant committed an offense specified in section 667.61, subdivision (c) against more than one victim, convictions for which would have required the trial court to sentence defendant to 15 years to life on each count under section 667.61, subdivision (b) of the One Strike Law. (§ 667.61, subd. (b).) In a pre-sentencing memorandum, the District Attorney acknowledged that a 15-years-to-life sentence could not be imposed on counts 1 (§ 288.5, victim Oscar A.) or 2 (§ 288.5, victim Miguel S.) because at the time defendant committed those crimes a violation of section 288.5 was not a qualifying offense under section 667.61. The court accordingly sentenced defendant to determinate sentences on the two counts. Of significance, neither the district attorney nor defense counsel suggested that Count 12 as well did not qualify for an indeterminate sentence. The trial court imposed 15 years to life on that count.[2]

Defendant timely appealed.

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[2] The trial court sentenced defendant to a total determinate sentence on the remaining counts of 32 years and four months, with 400 days of conduct and custody credit. As no portion of the determinate sentence is challenged on appeal, we find it unnecessary to provide additional details of the sentence.

## *DISCUSSION*

### A. Defendant Did Not Commit Multiple Offenses Specified in the Applicable Version of Section 667.61. Accordingly, the Multiple Victim Circumstance Did Not Apply.

Section 667.61 is a One Strike alternative sentencing scheme that authorizes life in prison for specified sexual offenses if certain enhancements are found to be true. (*People v. McQueen* (2008) 160 Cal.App.4th 27, 36.) Here, the trial court imposed a life sentence of 15 years to life on count 12 (David V.) pursuant to section 667.61, subdivision (b) based on the jury's finding that defendant had committed an offense specified in that statute against more than one victim. Defendant argues, respondent concedes, and we agree that under the circumstances of this case, the sentence violates ex post facto principles. (See *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1174 [Based on the ex post facto rule, legislatures " 'may not retroactively alter the definition of crimes or increase the punishment for criminal acts.' [Citations.]"].)

Count 12 alleged that, on or between January 15, 2000 and January 14, 2002, defendant committed a lewd act upon a child under the age of 14 years old in violation of section 288, subdivision (a). The information further alleged as to that count that the crimes defendant committed in counts 1 and 2 (§ 288.5) qualified for section 667.61 multiple victim enhancements, thus triggering the 15-years-to-life sentence in section 667.61, subd. (b).[3] The jury found defendant guilty of counts 1, 2 and 12

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[3] Count 12 also alleged that the crime charged in count 10 (§ 288, subd. (a)) against another victim also qualified as a multiple victim offense that triggered the 15-years-to-life

and found the multiple victim circumstances true. As we have observed, at sentencing, counsel and the trial court agreed that counts 1 and 2 did not trigger the 15-years-to-life sentence because at the time the crimes were committed, section 288.5 was not enumerated as a qualifying offense under section 667.61. Accordingly, the court imposed determinate sentences on both counts.

Count 12 was not part of that discussion, probably because the crime of which defendant was convicted in count 12 (section 288, subdivision (a), victim David V.), unlike counts 1 and 2, *was* a qualifying offense. (Former § 667.61, subd. (e)(5) as amended by Stats. 1998, ch. 936, § 9 (AB 105), effective Sept. 28, 1998.) The trial court eventually imposed the 15-years-to-life sentence in count 12, finding that counts 1 and 2 qualified as the multiple victim enhancemen.t What both the court and counsel apparently overlooked was that for the same reason counts 1 and 2 were not qualifying offenses under section 667.61, they were also not offenses which could be used for the multiple victim enhancement. At the time these crimes were committed, section 288.5 was neither a predicate crime under section 667.61, nor did it qualify as a multiple victim offense.

Under the version of section 667.61 in effect when defendant committed the offense in count 12, the multiple victim circumstance applied when the defendant had "been convicted in the present case or cases of committing an offense specified in

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sentence. The crime alleged in count 10 would have qualified as a multiple victim offense but defendant was found not guilty of that charge. This left only the section 288.5 crimes alleged in counts 1 and 2 as potential qualifying offenses.

subdivision (c) against more than one victim." (Former § 667.61, subd. (e)(5) as amended by Stats. 1998, ch. 936, § 9 (AB 105), effective Sept. 28, 1998.) Subdivision (c) of the statute, in turn, enumerated section 288 — the offense at issue in count 12 — as one of the listed crimes. (*Ibid*.) However, counts 1 and 2 alleged violations of section 288.5, which was not an offense listed in subdivision (c) of section 667.61 at the time the crime alleged in count 12 was committed.

The Attorney General and defendant on appeal recognize that under the *current* version of section 667.61, the multiple victim circumstance would apply to defendant because section 288.5 was added to subdivision (c)(9) of the statute in 2006. (See *People v. Valenti, supra,* 243 Cal.App.4th at p. 1174.) However, under the version of section 667.61 in effect at the time of the crimes, defendant had committed only one of the offenses specified in subdivision (c) against one victim (count 12, David V.). Because section 667.61's multiple victim circumstance was not established by the evidence, the 15-years-to-life sentence cannot stand. The proper remedy is to vacate the sentence on this count and remand for resentencing under the law in effect at the time of the offense. (*People v. Hiscox* (2006) 136 Cal.App.4th 253, 262.)

**B. The Trial Court Prejudicially Erred In Not Instructing the Jury that Defendant Could Not Be Convicted of Continuous Sexual Abuse and an Individual Act of Abuse That Occurred Within the Same Time Period Against the Same Victim.**

Defendant contends the conviction for count 7 (attempted sodomy of Miguel) must be reversed because the jury was not instructed it could not convict defendant of that charge if the

crime occurred during the period of continuous sexual abuse of Miguel alleged in count 2. Respondent takes no position on whether there was instructional error but argues that any error was harmless. We conclude the trial court should have instructed the jury that it could not convict defendant of both counts 2 and 7 if it found that the time periods for the crimes overlapped. We further conclude that defendant was prejudiced by the error.

"In reviewing a claim of instructional error, the ultimate question is whether 'there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner.' [Citation.] '[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.]" (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220, abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

Defendant was convicted in count 2 of violating section 288.5 — continuous sexual abuse of Miguel, a child under 14. Subdivision (c) of the statute provides:

"No other act of substantial sexual conduct, as defined in subdivision (b) of Section 1203.066, with a child under 14 years of age at the time of the commission of the offenses, or lewd and lascivious acts, as defined in Section 288, involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than

one victim is involved in which case a separate count may be charged for each victim."[4]

Section 288.5 precludes the jury from convicting a defendant of both continuous sexual abuse and the individual underlying acts of that abuse. If the prosecution charges the defendant with a violation of section 288.5 and any other sexual felony occurring during the same time period, the offenses must be charged in the alternative. (See *People v. Johnson* (2002) 28 Cal.4th 240, 244–246.)

The information alleged in count 2 that the continuous sexual abuse of Miguel occurred when he was under the age of 14 years old. Defendant was charged in count 7 with the attempted sodomy of Miguel when he was under the age of 16 years old (§§ 664/286, subd. (b)(2)).

Although the information properly alleged the attempted sodomy occurred *after* Miguel's 14th birthday, at trial the prosecution proceeded on the theory that the attempted sodomy occurred sometime before Miguel's 16th birthday without specifying that the charge was limited to events that occurred *after* Miguel was 14. Unlike the information, neither the jury instructions nor the verdict forms included the date ranges during which the continuous sexual abuse and the attempted sodomy occurred. The attempted sodomy jury instruction and verdict form only informed the jury that the crime had to have occurred before Miguel's 16th birthday; the continuous sexual abuse jury instruction only stated that the crime had to have been committed before Miguel's 14th birthday. Miguel testified that the sodomy occurred when he was "probably 14, 13." If the

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[4] Section 288.5 is one of the statutes enumerated in section 1203.066.

attempted sodomy in fact had occurred when Miguel was 14, by definition it would not be part of the continuous sexual abuse which requires the victim to be under 14. However, if the attempted sodomy had occurred when Miguel was 13 then it fell within the period covered by the continuous sexual abuse.

To avoid the prohibition of section 288.5, subdivision (c), the People had to prove that any charged individual sex crime involving Miguel as the victim was outside the continuous sexual abuse date range. Given the possibility that an uninformed jury might convict defendant of both counts 2 and 7 for events that occurred when Miguel was 13, the trial court was obligated sua sponte to instruct the jury on the principles set forth in section 288.5. The Bench Notes to CALCRIM No. 1120 make the point clear:

"Under Penal Code section 288.5 (c), continuous sexual abuse and specific sexual offenses pertaining to the same victim over the same time period may only be charged in the alternative. In these circumstances, multiple convictions are precluded. (*People v. Johnson*[, *supra*,] 28 Cal.4th [at pp.] 245, 248.) In such cases, the court has a sua sponte duty to give CALCRIM No. 3516, Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited. If a defendant is erroneously convicted of both continuous sexual abuse and specific sexual offenses and a greater aggregate sentence is imposed for the specific offenses, the appropriate remedy is to reverse the conviction for continuous sexual abuse. (*People v. Torres* (2002) 102 Cal.App.4th 1053, 1060.)" (Bench Notes to CALCRIM No. 1120 (2018).)[5]

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[5] CALCRIM No. 3516 [Multiple Counts: Alternative Charges for One Event — Dual Conviction Prohibited] provides in part:

We now turn to whether the error was prejudicial. "When one of the theories presented to a jury is legally inadequate, such as a theory which ' "fails to come within the statutory definition of the crime" ' [citations], the jury cannot reasonably be expected to divine its legal inadequacy. The jury may render a verdict on the basis of the legally invalid theory without realizing that, as a matter of law, its factual findings are insufficient to constitute the charged crime. In such circumstances, reversal generally is required unless 'it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory.' " (*People v. Perez* (2005) 35 Cal.4th 1219, 1233.)

Although the prosecutor did not expressly argue to the jury that defendant could be convicted of both continuous sexual abuse and attempted sodomy that occurred during the same time

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"[The defendant is charged in Count with <*insert name of alleged offense*> and in Count with <*insert name of alleged offense*>. These are alternative charges. If you find the defendant guilty of one of these charges, you must find (him/her) not guilty of the other. You cannot find the defendant guilty of both.]."

The Bench Notes raise the duty to instruct in section 288.5 cases:

"Because the law is unclear in this area, the court must decide whether to give this instruction if the defendant is charged with specific sexual offenses and, in the alternative, with continuous sexual abuse under Penal Code section 288.5. If the court decides not to so instruct, and the jury convicts the defendant of both continuous sexual abuse and one or more specific sexual offenses that occurred during the same period, the court must then decide which conviction to dismiss."

period, his argument left the option open. Neither by inference nor by express words did he make it clear to the jury that the attempted sodomy had to have occurred when Miguel was between 14 and 16 and not under 14, the cutoff for the continuous sexual abuse charge. Thus, the prosecution's argument to the jury was consistent with a legally invalid theory — that defendant could be convicted of both continuous sexual abuse and a distinct act of sexual abuse, even if the individual act occurred during the period of continuous abuse. The court did not instruct the jury that it could convict defendant of both counts only if it found the attempted sodomy occurred after the period of continuous sexual abuse. Nor did the verdict forms alert the jury to this issue. Under this circumstance, we reverse the conviction of the offense that carries the lesser penalty unless we can determine from the record that the jury necessarily found defendant guilty on the proper theory. (*Perez*, *supra*, 35 Cal.4th at p. 1233.)

The record does not establish that the jury necessarily found defendant guilty of attempted sodomy that occurred after Miguel turned 14. The only evidence of the timing of the crime was Miguel's testimony which was ambiguous as to whether the crime happened when Miguel was 13 or 14. Accordingly, the error was prejudicial.

Because the two convictions cannot stand, we must reverse either the continuous sexual abuse in count 2 or the attempted sodomy charge in count 7. We follow the rule in *People v. Torres*, *supra*, 102 Cal.App.4th 1053, 1057 and "leave appellant standing convicted of the alternative offenses that are most commensurate with his culpability." (*Id*. at p. 1059.) The trial court imposed a sentence of 12 years on count 2 and a sentence of 4 months on

count 7. Accordingly, we reverse the conviction for count 7 (attempted sodomy). As the reversal is based on instructional error and not the insufficiency of the evidence, the People may retry defendant on count 7 if it chooses. (See *In re Cruz* (2003) 104 Cal.App.4th 1339, 1349.)

***DISPOSITION***

The sentence imposed for count 12 is vacated, and the matter is remanded for resentencing without application of the One Strike law (§ 667.61). The conviction on count 7 for attempted sodomy upon a child in violation of section 286, subdivision (b)(2) is reversed. In all other respects the judgment is affirmed.

RUBIN, P. J.

WE CONCUR:

BAKER, J.

MOOR, J.